



STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MRA-40/46653

PRELIMINARY RECITALS

Pursuant to a petition filed November 1, 2000, under Wis. Stat. §49.45(5) to review a decision by the Milwaukee County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on December 20, 2000 at Milwaukee, Wisconsin. At the request of petitioner's representative, the record was held open for 30 days (until January 19, 2001) for submissions by petitioner. The petitioner timely filed his submission with the Division of Hearings and Appeals. That submission will be marked as Exhibit 4 and received into the record.

The issue for determination is whether the community spouse's income allocation may be increased.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Representative:

[REDACTED]

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Patricia Quezaire, ES Supervisor  
Milwaukee County Department of Human Services  
1220 W. Vliet Street  
Milwaukee, WI 53205

Gary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner [REDACTED] is a resident of a nursing home in Milwaukee County. His wife, Dolores Stamborski, resides in the community.
2. Petitioner's monthly income is \$2,522.74 including \$843 in Social Security, and \$1,679.74 from a State of Wisconsin pension. See Exhibit 1. His wife's has monthly income of \$1,298.94 including \$371 in Social Security, and \$927.94 from a life insurance annuity policy. See Exhibit 1.
3. The county agency determined the allocation to the community spouse to be \$576.06 (\$1,875 - petitioner's income of \$1,298.94 = \$ 576.06 as of November, 2000. See Exhibit 2.
4. The county agency incorrectly sent a September 28, 2000 Notice of Decision to the petitioner stating that his cost of care contribution would be increased from \$1,733.69 to \$1,906.48 effective November 1, 2000 due to an alleged increase in petitioner's unearned income. See Exhibit 3. During the hearing, the county agency failed to provide any testimony or evidence to establish any increase in petitioner's unearned income to justify the increase in petitioner's cost of care contribution.
5. Petitioner filed this appeal challenging the increase in his cost of care contribution, and seeking an increase in his wife's income allocation.
6. Petitioner's wife provided documentation and testimony alleging her basic and necessary monthly expenses total \$2,448.88. See Exhibit 4. Exhibit 4 is a summary of Mrs. Stamborski's monthly expenses with attached documentation.
7. Two items in Exhibit 4's monthly expenses are questionable as not basic and necessary expenses.

### DISCUSSION

Sec. 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s.13964-5 (MCCA). Among other things, the "spousal impoverishment" provisions at sec. 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. That allowance set by the county was \$576.06 because the community spouse received \$1,298.94 in other monthly income as explained in Finding of Fact #2 above. See MA Handbook, Appendix 23.6.0 (dated 5-1-2000). However, the institutionalized person may divert some of his income to his community spouse rather than contributing to his cost of care. The amount of the diverted income, when combined with the spouse's income, cannot exceed the maximum allocation determined by the county. Any income of the institutionalized spouse that is not allocated to the community spouse or the personal needs allowance must be paid to the nursing home as the person's cost of care contribution.

A fair hearing officer can grant an exception to this limit on income diversion. The hearing officer may increase the income allowance following a fair hearing. The hearing officer does not have unfettered discretion in creating an exception to the maximum allocation ceiling, however. The relevant statutory provision states that the test for exception is as follows:

- (c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

Sec. 49.455(8)(c), Stats, emphasis added. Thus a hearing officer may augment the maximum allocation ceiling only by amounts needed to alleviate "financial duress", to allow the community spouse to meet necessary and basic maintenance needs.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for a Hearing Officer to use expenses, they must meet "necessary and basic maintenance needs" MA Handbook, Appendix 23.6.0 or the expenses are "due to exceptional circumstances resulting in financial duress." "Income Allocation". This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". Sec. 49.455(8)(c), Stats., (emphasis added.) Because the community spouse is essentially asking state taxpayers to give the nursing home or group home resident more welfare in the form of MA, I do not think that every expense is automatically appropriate for inclusion, even if it is not frivolous. Moreover, the purpose of allocating more income to the community spouse is to prevent "financial duress", not just to make that spouse's living circumstances more comfortable or enjoyable.

While the record was held open, petitioner's wife timely submitted her list of monthly expenses in her budget of \$2,448.88. See Exhibit 4. However, Exhibit 2 has two listed expenses which are questionable as "necessary and basic maintenance needs" or needs to prevent "financial duress":

1. Cash Contributions (\$25) - The petitioner's monthly "cash contributions" to her church - the \$25 is a private decision of petitioner as to which private organization she wants to support. There is a long history of precedents by the Division of Hearings and Appeals not allowing cash contributions as basic and necessary expenses. Furthermore, there is no intent in the spousal impoverishment program for income allocation to support petitioner's private contributions (reduction of \$25).

2. "Miscellaneous" (\$75) - there is no testimony or evidence that establishes that this vague category of "miscellaneous" items rises to be a "basic and necessary maintenance need" and creates an exceptional circumstance resulting in financial duress (without the "miscellaneous items"). The burden of proof was upon the petitioner to establish each and every item in her monthly budget. The vague, undocumented term of "miscellaneous" does not establish such burden of proof. (reduction of \$75).

The changes indicated above are two reductions (\$25 and \$75 for a total reduction of \$100). By subtracting \$100 from the requested income allocation of \$2,448.88 (Exhibit 4), the petitioner's monthly basic expenses are \$2,348.88.

The petitioner requested the redetermination in the hope of lowering her husband's cost of care and increasing her income allocation. A fair hearing officer can grant an exception to the limit on income diversion. However, the hearing officer does not have unfettered discretion in creating an exception to the maximum allocation ceiling. A hearing officer may augment the maximum allocation ceiling only by amounts needed to alleviate financial duress, to allow the community spouse to meet necessary and basic maintenance needs. I do conclude that petitioner's requires an increase in her monthly income allocation to raise that amount to \$2,348.88 per month.

### CONCLUSIONS OF LAW

Petitioner's wife needs a monthly income allocation of \$2,348.88 to avoid financial duress.

NOW, THEREFORE, it is

**ORDERED**

That the matter is remanded to the county with instructions to increase the monthly income allocation to petitioner's wife from \$1,875 to \$2,348.88 retroactive to November 1, 2000 (the date on which the petitioner proposed to increase petitioner's cost of care contribution in Exhibit 3). The county shall take the action within 10 days of the date of this decision.

**REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

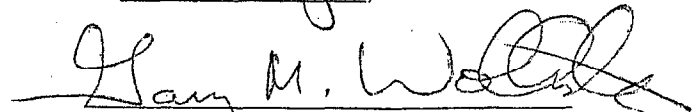
Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this 1 day  
of February, 2001.



Gary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals  
1-29-2001gmw

cc: Milwaukee County DHS 9368  
DHFS - Susan Wood